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IN THE

SUPREME COURT

OF THE

United States

October Term, 1956

DAVID S. ALBERTS,
Appellant,

vs.

STATE OF CALIFORNIA,
Appellee.

On Appeal From Judgment of Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

BRIEF FOR THE APPELLEE

EDMUND G. BROWN, Attorney General of the State of California
CLARENCE LINN,
Assistant Attorney General
LOUIS FRANKEL, of Counsel
WILLIAM B. McKESSON,
District Attorney of Los Angeles County, State of California
JERE J. SULLIVAN
FRED N. WHICHELLO
LOUIS WATNICK
ROBERT LEDERMAN
Deputy District Attorneys
Attorneys for Appellee.

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DAVID S. ALBERTS, *Appellant,* vs. STATE OF CALIFORNIA, *Appellee.*		No. 61

BRIEF FOR THE APPELLEE

On Appeal From Judgment of Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

QUESTIONS PRESENTED FOR REVIEW

1. Does the California statute, on its face, and as construed and applied, violate the appellant's rights guaranteed by either the First Amendment to the Constitution of the United States,[1] in that it encroaches

[1]Throughout the brief the appellee will assume that the provisions of the First Amendment to the Constitution are so incorporated in the Fourteenth Amendment as to make the provisions of this First Amendment as applicable to the legislative power of the states, as they are to Congress. *(Winters v. New York* (1947), 333 U.S. 507, 508, 92 L.Ed. 840, 846, and cases cited therein.)

on his rights to freedom of speech and of the press; or his rights under the Fourteenth Amendment to the Constitution of the United States, in that the wording of that statute is so vague and indefinite as to render its application to him a taking of his property and liberty without due process of law?

2. Does the California statute, as applied here, violate Article 1, Section 8, Clause 7 of the United States Constitution respecting federal postal power, in that the statute, as applied to appellant, invades the exclusive power of the Federal Government to regulate postal matters?

STATUTE INVOLVED

Section 311, subdivisions 3 and 4 of the Penal Code of the State of California provides, so far as here material:

> "Every person who wilfully and lewdly, either:
>
> . . . . . .
>
> "3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, cases, or otherwise makes any obscene or indecent figure; or,
>
> "4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, picture, print or figure; . . ."

is guilty of a misdemeanor punishable by fine and imprisonment.

STATEMENT OF THE CASE

On June 10, 1955, appellant was found guilty of two counts of violating Section 311 of the Penal Code of the State of California, which charged him, in Count I, with writing, composing, stereotyping, printing, publishing, selling, distributing, keeping for sale and exhibiting obscene and indecent writings, papers, and books, and, in Count II, with writing, composing and publishing a notice and advertisement of an obscene and indecent writing, paper, book, picture, print and figure, in violation of Subdivisions 3 and 4 of said code section.

Appellant was placed on probation for two years on condition that he not violate California Penal Code Section 311 or have in his possession any obscene or indecent literature or picture for two years, and with a further condition that he serve 60 days in the County Jail and pay a fine of $500. (R. 1-5.)

A synopsis of the facts upon which the appellant was convicted is as follows:

FRANK W. BRIDGES is a deputy sheriff attached to the vice detail. On February 25, 1955, at approximately 1:00 p.m., he commenced a search of the premises located at 8733 Santa Monica Blvd. He had a search warrant. (R. 24, 25.) This is the location where the appellant maintains a warehouse. (R. 100.)

A bundle of small booklets, approximately 3 inches by 4½ inches and bearing the titles: (1) "Ballad of

a Nun and Other Poems," (2) "Homosexual Life," (3) "Letters of the Courtesans," (4) "How To Be Married Though Happy or How To Be Happy Though Married," (5) "The Prostitute and Her Lover," (6) "The Love Affair of a Priest and a Nun," (7) "Amorous Tales of the Monks," (8) "Wild Women of Broadway," (9) "Strange Marriage Customs," (10) "Confessions of a Minister's Daughter," and (11) "The Fleece of Gold," included in People's Exhibit 1,[2] were found on one of the shelves at 8733 Santa Monica Blvd. (R. 24-26, 64).

An advertising brochure, marked People's Exhibit 2, was found at the Santa Monica address, on the above date. (R. 26.) The sales brochure, marked People's Exhibit 3, was found at the same time and place. (R. 27).

A series of pictures entitled "Tina's Torture", marked People's Exhibit 4, were found at the same time and place. (R. 27.)

A series of eight booklets bearing the following titles: (1) "Petting as an Erotic Exercise," (2) "Bestiality and the Law," (3) "Male Homosexuals Tell Their Stories," (4) "The Business Side of the Oldest Business," (5) "Questions and Answers About Orogenital Contacts," (6) "The Picture of Conjugal Love," (7) "William Heirens — Notorious Sex Maniac," (8) "Female Homosexuals — Lesbians Tell

[2]All exhibits were received in evidence at R. 64. Therefore, this reference will not be repeated as other exhibits are mentioned.

Their Stories," (9) "Bestiality in Ancient and Modern Times," included in People's Exhibit 5, were seen by the witness at the same time and place. (R. 27, 28.)

Twenty packets of pictures, one of which shows girls tied to a dental or barber chair, included in People's Exhibit 6, were seen by the witness at the same time and place. (R. 28.) There was more than one copy of all of the exhibits previously identified by the witness at the location on Santa Monica Blvd. In each instance, the officers took six copies, so that there were at least five duplicates of each exhibit. (R. 28, 29.)

Additional books, pamphlets, stereo-slides and pictures in large numbers, hundreds and possibly thousands, were also taken from the same warehouse. (R. 30, 31.) Another sales brochure was marked People's Exhibit 8. (R. 32.) The witness testified that a photograph of a figurine of a hula girl was similar to one of the figurines taken from the location. It appears in the portion of the paper described as "Learn Nancy's Secret, Naughty Nancy." (R. 32, 33.) The witness saw more than one brochure similar to People's Exhibit 8 at the same time and place. (R. 33.)

Several mailing lists that were not in duplication were taken at the same time and place. (R. 33.)

The witness observed more than six copies of the books which comprised People's Exhibit 9 at the Santa Monica Blvd. location. (R. 45.) There were six or more copies of the book "Sword of Desire" (People's Exhibit 11) at the location on the occasion of the search. (R. 45, 46.)

It was stipulated that a copy of the inventory of the items taken was given to "the person at the address." (R. 45.)

RUSSELL GARDNER is a deputy sheriff and one of the investigating officers in this case. (R. 34, 35.) On the 25th of February, he investigated the building at 8620 Melrose Boulevard (R. 35) (where appellant, David S. Alberts, maintains a mail order business. [R. 100.]) The witness had a search warrant. (R. 36.) The witness saw People's Exhibit 8, or a similar brochure, at that location. (R. 35.)

In the building there were various types of machinery such as typewriters, addressing machines and mail bags. There were also numerous brochures of the nature already described by the witness. (R. 35.)

At the time, six women were in the rear portion of the building, busy typing addresses from an address list to envelopes which contained "these various brochures." There were also various books, records, mail lists and other pamphlets at the location, together with shelves for storage of "these materials." (R. 35, 36.)

Six books entitled (1) "To Beg I Am Ashamed," (2) "Witch on Wheels," (3) "The Pleasures of the Torture Chamber," (4) "Snow Job," (5) "She Made It Pay," and (6) "Sword of Desire," included in People's Exhibit 9, were "recovered" from the same location. (R. 36, 37.)

Ten issues of a magazine entitled "Good Times", marked People's Exhibit 10, were found at the same

place and time as the other exhibits and there were more "than this series." (R. 37.)

The witness noticed a yellow slip of paper protruding from the book entitled "Sword of Desire" (then a part of Exhibit 9),[3] and noted that the wording on the yellow slip was, "Important notice: Due to circumstances beyond our control it was necessary to make a substitution in your order. When we do so we always substitute an item of more select nature. We have done so in this case." (R. 37, 38.) The book "Sword of Desire" and the yellow slip were withdrawn from Exhibit 9 and marked People's Exhibit 11. (R. 38.)

A box containing thirteen stereo-slides and a stereo-viewer, People's Exhibit 12, was found at the Melrose location, at the time of the search, together with the other boxes of slides, including duplicates of Exhibit 12. (R. 38, 39.)

An envelope containing a comic strip consisting of several sequence sheets entitled "Madame Olga's Recruits" and negatives for them, are People's Exhibit 13, and were found in the same building as the aforesaid exhibits. (R. 39.)

An envelope containing several sheets, four photographs to a sheet, in which appeared one or more girls, People's Exhibit 14, had been seen by the witness before. (R. 39, 40.) An envelope containing negatives and prints of the figure or figures of girls or women,

[3]Note, infra, later withdrawn from Exhibit 9 and made Exhibit 11.

People's Exhibit 15, was seen by the witness "at the location . . . on February 25, 1955." (R. 40.)

An envelope with negatives, and prints of the negatives in which appeared two women, one of whom appears to be strapped in a barber's chair, People's Exhibit 16, was found at the same time and place. (R. 40.)

TANAGRA REGAS was employed by appellant at 8627 Melrose Avenue as a file clerk. (R. 47.) She has seen brochures of the type included in People's Exhibit 2 at the location on Melrose Avenue and knows that they were mailed from that location. (R. 47.)

She affixed a gummed label to an envelope which contained a notation "Male Merchandise Mart," and used that name as part of the return address of that location. (R. 47, 48.) She used the names "S Shop" or "Stagg Shop" "as" the return address on envelopes mailed from "that location." The words "Sailor Jock's Club" were used as a return address on envelopes "out of that location." There were five persons employed there. (R. 48.) The witness received letters in her basket which appeared to be addressed to "this location." One of these letters, People's Exhibit 17, was one of the letters she received to work upon. (R. 49.)

ROBERT J. WALLACE is a deputy sheriff attached to the vice detail. On February 25, 1955, he proceeded to 11064½ Strathmore Drive in West Los Angeles with a search warrant for that address. Appellant and his wife were there. (R. 51, 52.) The Appel-

lant was shown a copy of the search warrant and the witness was admitted into the apartment wherein he found a brochure similar to People's Exhibit 3. Another brochure found at the Strathmore location is People's Exhibit 18. (R. 51, 52, 53.)

Four booklets entitled "Padlocks and Girdles of Chastity," "Straps and Stripes," "Memoirs of a Spankee," and "Slaves of the Lash," People's Exhibit 21, a pamphlet entitled "Unique for Lovers of the Unusual," People's Exhibit 22, were found in the house "at that location." (R. 55.) There were duplicates of "Straps and Stripes," "Memoirs of a Spankee," and "Slaves of the Lash." (R. 55.)

People's Exhibit 17 was received into evidence for the limited purpose of showing the procedure (of the handling of letters at the establishment in question) and not "from the standpoint of what the letter contains." (R. 64.)

All exhibits were received in evidence. (R. 64.) There was no objection to the other exhibits being received into evidence.

The appellant, David S. Alberts, maintains a mail order business in Los Angeles County, at 8627 Melrose Ave. and 8733 Santa Monica Blvd. (R. 100.) Appellant knows the books entitled "Witch on Wheels," "Snow Job," "She Made It Pay," and "Sword of Desire." (Exhibits 9 and 11.) He has seen the books. He had some in his business office. (R. 102.)

The brochures, which are People's Exhibits 2 and 3, are made up by an advertising agency employed by

appellant. (R. 105, 106.) Appellant directed the brochure, Exhibit 2, be sent out of his establishment. (R. 108.) He knew about the reading material found in the books listed in People's Exhibit 3. (R. 107.)

The group of cartoons known as "Olga's Recruits," People's Exhibit 13, was directed by appellant to be sent out through the mail. (R. 108-109.) Appellant had general knowledge of the type of reading material listed in People's Exhibit 3, and had been advertising them since February, 1954. (R. 107.)

SUMMARY OF ARGUMENT

Appellee contends:

(1) That the state has the exclusive right, the power and the duty to protect its citizens' health, general welfare, and morals by enacting laws for such purposes.

(2) That statutes which prohibit, restrict or regulate obscene matter come directly within such state power.

(3) That such statutes are not in conflict with the Federal Constitution, do not violate the First Amendment with reference to freedom of speech or press, nor are they unconstitutionally vague or indefinite, nor do they violate any other precept of due process under the Fourteenth Amendment.

(4) That the facts of the instant case clearly show that appellant was guilty of possessing and advertising

for sale, obscene and indecent literature, pictures and other articles; that the California law here involved, as here applied by the California courts, is definite, certain and in no way violates any provision of the Federal Constitution.

(5) The facts show no usurpation of the federal postal power.

Therefore, the convictions in the instant case should be affirmed.

I.

THE STATES HAVE THE POWER TO RESTRICT, PROHIBIT OR REGULATE OBSCENITY.

The police power of the states includes those inherent governmental powers which, under the United States Constitution, are reserved to the several states to promote and to protect the order, safety, health, morals and general welfare of its citizens. It is an indispensable prerogative of sovereignty.

This power may be exerted to preserve the public morals by regulating and preventing such acts, practices and occupations as are in themselves immoral or indecent or have a tendency to promote immorality or indecency. (16 C.J.S. 923, Sec. 186 and case cited.)

It seems incontrovertible that matters which are obscene are also immoral and indecent, in fact the very definition of obscenity encompasses these terms.

The inclination of a percentage of mankind to ignore conventionalities, moral codes and inhibitory statutes and to indulge in licentious practices arising from the sex impulse is too well known to the student of history and sociology to require extended discussion. They have been prohibited in every land of recorded history from ancient Babylon (Code of Hammurabi) to the present time.

By reason of the continued presence of such element whose lack of restraint would, by subverting the common morality, weaken the foundations of an approved social order, the Legislature may suppress the practice deemed inimical to the state and may adopt such measures as may be reasonable to effectuate its purpose. *(In re Maki* (1943), 56 Cal. App. 2d 635, 640, citing *Purity Extract and T. Company v. Lynch,* 226 U.S. 192 [57 L.Ed. 184].)

Furthermore, in testing the legislative judgment with respect to the necessity for the enactment of regulatory laws in the absence of a judicial determination to the contrary, the presumption is that the Legislature's action in passing such a law was supported by known facts requiring the enactment. *(South Carolina State Highway Department v. Barnwell Brothers* (1938), 303 U.S. 177 [82 L.Ed. 734].)

The legislatures of 47 states, (all but the state of New Mexico), which have enacted laws which prohibit and regulate obscene matters could well have found facts which led them to believe that the uncontrolled and unrestricted distribution, and sale of ob-

scene, indecent, salacious and lewd material would lead to a lowering of the moral standards of its populus and would directly affect a substantial number of its citizens. The very fact that such legislation is so universal would support such a statement.

In *State v. Becker* (1954), 272 S.W. 2d 283, 286, the Supreme Court of Missouri affirmed a conviction for selling and possessing "certain obscene, indecent, scandalous and immoral publications . . ." and in its discussion, stated:

> "The people of this state speaking with their constitutional voice, the general assembly, enacted this statutory proscription of obscenity for the protection of *all* the people of the state. Under this statute and the prior rulings of the courts we may not disregard an unambiguous enactment which has as its obvious purpose the protection of the morals of the susceptible into whose hands these publications may come. While we recognize that morality may not be attained by legislation, a people none the less need and deserve a moral standard and the protection and enforcement of such a statute.
>
> . . .
>
> "In any event, we live today in a clothed civilization. The people of Missouri exercised the state's sovereign police power in enacting this statute, and we may not by judicial fiat invade the legislative function and rule that the people of Missouri did not mean what this unambiguous statute so exactly and solemnly declares, and in so ruling be untrue to our responsibility and to the public trust reposed in us."

A case decided as recently as February 27, 1957, *One, Inc. v. Otto K. Oleson,* No. 15139, ... F. 2d ....., (Ninth Circuit),[4] in holding a certain publication obscene, reviews the definitions and tests of obscenity used and approved by the federal courts. In discussing the terms "obscene, lewd, salacious, filthy or indecent," the court stated:

> "These words can only be defined by some discussion of the moral sense of the public, and it is only to such extent that we are concerned with public morals. In approaching the moral side of the issue here presented, we are not unmindful of the fact that morals are not static like the everlasting hills, but are like the vagrant breezes to which the mariner must ever trim his sails. . . ."

It is therefore apparent that statutes dealing with obscene, lewd and salacious matter come within the power of the state under the broad powers reserved to them by the Federal Constitution and their inherent sovereign power.

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[4]In view of the importance and recent date of this case, we have inserted the full text in an appendix to this brief.

II.

CONSTITUTIONALITY OF OBSCENITY STATUTES

Appellant's principal attack on the constitutionality of obscenity statutes is twofold: First, that statutes which prohibit or restrict obscene literature or writing violate freedom of speech and press contrary to the terms of the First Amendment; and second, that the terms "obscene," "lewd," "salacious," and other similar terms which are used in this type of statute, are so vague and indefinite as to deny appellant due process of law under the Fourteenth Amendment.

A careful analysis of these contentions leads to the conclusion that they are without foundation and that statutes which prohibit and curb obscenity are constitutional.

A. Statutes Which Prohibit, Control or Regulate Obscene Literature Are Not in Conflict With or in Contravention of the First Amendment to the United States Constitution.

Freedom of speech and of the press protects the right freely to utter and publish whatever one chooses with immunity from punishment. However, neither of these freedoms is absolute and unrestricted, each must be measured by the public welfare and limited by it. It has always been recognized that when the rights of others are interfered with or affected by speech and publications, such rights may be protected under our

laws and constitution. The guarantee of free speech and free press has never carried with it freedom from responsibility for abuse of those rights.

It has long been held that the right of freedom of speech and press is subject to the state's right to exercise its inherent police power and that clearly drawn regulatory legislation to protect the public from the evils inherent in the dissemination of obscene matter is not barred by the free speech or free press guarantee of the First Amendment. This has been held by state courts (See *Burke v. Kingsley Books* (1955), 142 N.Y. S. 2d 735; *People v. Doubleday & Co., Inc.*, 297 N.Y. 687, 77 N.E. 2d 6, affirmed by equally divided court, 335 U.S. 848, 93, L.Ed. 398; *State v. Becker, supra*, 272 S.W. 2d 283 [Mo.]; *Commonwealth v. Donaducy* (1950), 76 A. 2d 440 [Penn.]) and recognized by this court. (See *United States v. Alpers* (1950), 338 U.S. 680, 94 L.Ed. 457; *Winters v. New York* (1948), 333 U.S. 507, 510, 518, 520, 92 L.Ed. 840; *United States v. Limehouse* (1932), 285 U.S. 424, 76 L.Ed. 843; see also *Chaplinsky v. New Hampshire* (1942), 315 U.S. 568, 571, 572, 86 L.Ed. 1031; *Near v. Minnesota* (1931), 283 U.S. 697, 716, 75 L.Ed. 1357; *Beauharnais v. Illinois* (1952), 343 U.S. 250, 266, 96 L.Ed. 919.)

In the *Chaplinsky* case, *supra*, at 315 U.S. 571-572, this court stated:

> "Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circum-

> stances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the *lewd* and *obscene,* the profane, the libelous, and the insulting or 'fighting' words . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." (Emphasis added.)

Appellant's brief assumes that the only restriction placed on the freedom of speech and press, is that presented by facts showing a clear and present danger of resulting criminal conduct; that the exposition of ideas, even though admittedly obscene, has not been shown to create a clear and present danger of such conduct, and that therefore the prohibition of obscene literature is unconstitutional under the provisions of the First Amendment.

In support of this assumption, appellant has quoted excerpts from articles, papers and texts referring to the effects of literature on the conduct of individuals. (App. Br., pp. 64-73.) However, none of these authorities purport to be conclusive, and it is admitted that in the fields in which studies of this type have been made and research done, there is a conflict of ideas. Many of the leading experts feel that there is a definite correllary between the exposition of ideas and conduct,

while others feel that there is no correlation whatsoever.[5]

The clear and present danger exception to the rights of free speech and press is not the only limitation on such rights, (as discussed hereafter). However, the legislation in question can be sustained pursuant to the clear and present danger doctrine, as well as otherwise.

It is a basic rule of judicial interpretation and examination of statutes that the legislative body is conclusively presumed to have investigated the facts and found necessity for the particular exercise of police power. (*South Carolina State Highway Department v. Barnwell Brothers, supra*, 303 U.S. 177 [81 L. Ed. 734]; *Burke v. Kingsley Books* (1955), 142 N.Y.S. 2d 735, 753, quoted at p. 21 of this brief.)

Only if the legislative body is clearly wrong as to the factual matters, including the occasion for the legislation and the causation of the evil sought to be remedied, will the courts invalidate the statute for these reasons and this is so in addition to the general doctrine that legislation is strongly presumed to be constitutional.

Every presumption favors the validity of a legislative enactment, and though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power.

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[5]See Comic Book Regulation—Fedder (1955), Bureau of Public Administration—University of California, for a lengthy discussion of the conflict of opinion with respect to the effect of comic books on our youth.

(*West Coast Hotel Co. v. Parrish* (1937), 300 U.S. 379, 81 L. Ed. 703, 108 A.L.R. 1330, affirming *Parrish v. West Coast Hotel Co.*, 55 P. 2d 1083, 185 Wash. 581; *Nebbia v. People of the State of New York* (1934), 291 U.S. 502, 537-538, 78 L. Ed. 940, 957.)

So that appellant, in contending that the statute here involved is unconstitutional, for lack of clear and present danger, undertakes a double burden: First, he must overcome the general strong presumption of constitutionality and, second, he must demonstrate by an overwhelming weight of authority that the legislative findings of fact are unsound.

The California Legislature, in enacting the statute attacked, and that of every other state (except New Mexico) enacting similar legislation, and the Congress of the United States, in contemplation of law, must have found that the sale and distribution of obscene matters presents a clear and present danger of criminal conduct resulting therefrom to an extent that there is occasion for society to seek to prevent these effects. (*Burke v. Kingsley Books, supra*, 142 N.Y.S. 2d 735, 753, as quoted as p. 21 of this brief.)

This belief is shared by society generally, as well as by the many jurists writing opinions favoring the validity of such legislation in the cases cited elsewhere in this brief.

Indeed, until very recent years, no one, to our knowledge, questioned these findings. Even now, no one, including appellant, contends that there is unimimi-

ty of expert opinion and scientific finding in this regard.

Since the record is devoid of expert evidence at the trial that obscene matters do or do not affect or effect human conduct to the detriment of society's morals, health and welfare, this court can only draw on its power of judicial notice in this regard. Appellant's references[6] by which he hopes to cast doubt on these effects are only proper for the consideration of this court if they are proper sources of judicial notice.

Such judicial notice, in scientific matters, can only be exercised where there is a substantial agreement of the authorities.

> "Scientific facts, in order to attract judicial notice, must be universally known, so that they are found in encyclopedias and dictionaries, or in the treatises of standard authors, or must be of such notoriety and so generally understood that they have become a part of the common knowledge of all. 15 R.C.L. Sec. 55." (*Raney & Hamon v. Hamilton & White* (1921), Tex. Civ. App., 234 S.W. 229, 231; see also 31 C.J.S. Evidence Sec. 76, pp. 659-660.)

For example, could this or any court take judicial notice, if it were pertinent to a case, that the "red shift", in the spectrum of light from distant stars, is caused by the recession of the sources in an expanding universe, rather than that it is caused by the "tired

[6]See App. Br., pp. 64-79.

light" effect? Judicial notice is improper in scientific matters where the authorities are in conflict.

The discussion as to whether or not sex crimes are so inspired, and whether juveniles are rendered delinquent, both in appellant's brief and Judge Frank's opinion,[7] assumes that the determination of the constitutionality of such statutes turns on the answers to these questions.

The doubt, if any, that the use of obscene matters affects or causes immoral or violent antisocial human conduct,[8] which is the best appellant can claim by his social authorities, would hardly seem sufficient to overcome the two presumptions cited, and the findings of the legislative bodies mentioned, which support the exercise of the police power under consideration.

In *Burke v. Kingsley Books*, supra, 142 N.Y.S. 2d 735, 753, the court said:

> " . . . The publication and distribution of material devoted to obscenity, lewdness, lasciviousness, filth, indecency and disgust—to crime, sex, horror, terror, brutality, lust and depravity—have been found by the Legislature to be a contributing factor to juvenile delinquency, a basic factor in impairing the ethical and moral development of our future citizens, and a *clear and present danger* to the people of our State. As such, these are, it seems to me, 'matters of state concern' 'in which the city is [also] interested.' " (Emphasis added.)

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[7] In the companion, consolidated case of *United States v. Roth* (1956) 237 F. 2d 796, 801-827.

[8] Turning on a series of socio-psychological phenomena rather than legal conclusions.

Heretofore, we have assumed, as does appellant in his brief, that the statute can be sustained only in the event that this court is convinced that the use of obscene articles creates a clear and present danger of the commission of overt sex crimes by the user. This assumption completely overlooks a number of other effects of such articles, any one of which warrants the exercise of the police power of the State.

No mention is made of several large groups of citizens entitled to consideration in this matter.

A large segment of the population, far from being stimulated erotically by obscenity, reacts with repulsion and disgust to such articles. This is particularly true of most women as noted by Kinsey in his Study of Sexual Behavior in the Human Female,[9] nor is this reaction confined to women. So, too, some men have cultivated standards of a degree of nicety, particularly in the field of sex, that a blatant display of the crudest physical aspects of the erotic is repellent to them. A common observation of those in law enforcement work is that a child suddenly confronted with a portrayal of perverted sexual matters reacts with extreme shock and terror. We are aware of this court's holding in the *Butler* case[10] passing on a statute aimed *only* at that which affects children, holding, in effect, that such a statute is unconstitutionally broad and that the deprivation of such materials to adults in order to avoid

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[9]Kinsey, Pomeroy, Martin, Gebhard, W. B. Saunders Co. Philadelphia, 1953, pp. 652, 653.

[10]*Butler v. Michigan* (February 25, 1957), 352 U.S. ....., 1 L.Ed. 2d 412

its effect on children is, in effect, to "burn the house to roast the pig."[11] We do not read the case to hold that, in considering the effect of obscene material affecting all age groups, its effect on children may not be considered.

Appellant, no doubt, would reply that such persons need not look at or read such material. Our answer to that argument would be that not all such publications warn the prospective reader as well as do those which were a part of appellant's stock in trade and are in evidence in this case. Such titles as "Petting as an Erotic Exercise", and "Questions and Answers About Oragenital Contacts"; serve fair warning of their contents. An example, from another case, to the contrary is, "Memoirs of Hecate County", by Edmund Wilson,[12] (held obscene in the Appellate Department of the Superior Court of Los Angeles County in *People v. Pickwick Book Shop* (1947), Cr. A. 2314, and in *People v. Doubleday & Co., supra,* 297 N.Y. 687, 77 N.E. 2d 6, affirmed in 335 U.S. 848, 93 L. Ed. 398.) Other examples are "The Tropic of Capricorn" and "The Tropic of Cancer" by Henry Miller.[13]

Furthermore, in the event of the triumph of appellant's contention in this court, holding that obscenity may not be proscribed, for any or all of the reasons urged, pictures of any degree of pornography, scatolo-

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[11] *Butler v. Michigan, supra,* 352 U.S. ..... 1 L.Ed. 2d 412, 414.

[12] Neither the title nor the name of the distinguished author warn the reader that in an otherwise well-written novel occurs an episode describing in detail the result of a visual examination of female genitalia.

[13] Held obscene in *United States v. Two Obscene Books* (1950), 92 F. Supp. 934; (1951), 99 F. Supp. 760; affirmed in *Besig v. United States* (1953), 208 F. 2d 142.

gy or concupicentiality, could, and no doubt would be, displayed openly, as salable merchandise visible to all, from the most prurient (at whom it would be aimed) to the most prudish (who would be most offended) and the very young (who would be frightened).

Parents constitute another class of persons reacting other than erotically to such materials. Respondent submits that whether or not it is psychologically established that obscenity harms children, the vast majority of parents not only do not wish their children exposed to it, but react with extreme displeasure if the possibility of such contact occurs. Most educators and religious leaders share these views. We submit that the scientific soundness of such opinions and reactions is not the controlling question—such persons are entitled to protection by the State.

Furthermore, since the medium of publication is not pertinent to the principles involved, there is no reason, should appellant's contentions prevail, that in lieu of the Mickey Mouse Club television program, the children assembled before their receiving sets for the purpose of viewing that well-established source of juvenile delight, should not be entertained, instead, by enactments of extracts from appellant's books showing sadomasochistic and oragenital activity. The preference of parents that this type of material be not shown on the family T.V. set, even though mistaken according to appellant's authorities, is entitled to consideration by the State in its exercise of the police power and by this court in examining the necessity therefor.

Appellant's brief exploits fully the bogeymen of the "Thought Police." He states, at p. 15,

> "This statute, however, is devoted solely to the restrictions of books which stimulate ideas, thoughts and desires."

Typical of the language of the many opinions of various courts sustaining statutes similar to the one herein involved under similar attack, is that of the Supreme Court of Missouri in *State v. Becker, supra,* (Mo.) 272 S.W. 2d 283, 286:

> "After applying the required tests, all the members of this court have concluded that the contents of these publications *tend to incite lascivious thoughts, arouse lustful desire,* encourage breaches of the law, and promote and encourage commission of crime, law violation and *moral decay.* . . . .
>
> "It has been long held that the right of freedom of speech is subject to the State's right to exercise its inherent police power. The right of free speech is not an absolute right at all times and under all circumstances. Such right does not include the right to possess with intention to sell and circulate any lewd, obscene, indecent, scandalous and immoral publication which, as we have above held, *tends to incite lascivious thoughts and arouse lustful desire,* encourage breaches of the law and *promote* crime and *moral decay.*" (Emphasis added.)

Thus the keeping for sale (as here) of articles which "tend to incite lascivious thoughts, arouse lustful de-

sire . . . encourage . . . moral decay," we contend, is a legitimate exercise of the police power, i.e., the protection of public morals entirely aside from the matter of inciting the user to overt sex crimes. This is not "Thought Control." It is a proper proscription of action as in the case of the keeping of narcotics.

Both the keeping of narcotics and obscene matter (for sale) are passive acts, both of which tend by their ~~ater-effects~~, to destroy moral fibre.

The statute is not an invasion of, but a legitimate exception to the rights of free speech and of the press as guaranteed by the First Amendment to the Constitution.

Commonwealth v. Donaducy, supra, (Penn.) 76 A. 2d 440, at p. 441, quotes a late expression of this court in an opinion ably discussing the matter of free speech and obscenity:

> "In view of the finding that the article is obscene, there is no merit in defendant's contention that his conviction violates the Federal Constitution. The right of the several states to prevent and punish the publication of obscene writings cannot successfully be disputed. . . . *Chaplinsky v. New Hampshire,* 315 U.S. 568, 571,572, 62 S. Ct. 766, 769, 86 L. Ed. 1031. . . . Even in striking down one section of a New York Statute, making it a misdemeanor to disseminate any publication devoted principly to criminal news, police reports, or accounts of criminal deeds or pictures, or stories of deeds of bloodshed, lust or crime, the Supreme

Court of the United States, in *Winters v. People of the State of New York*, 333 U.S. 507, 68 S. Ct. 665, 92 L. Ed. 840, inferentially approve another section of the New York act with provisions similar to our own Section 524. In that case the Court said, 333 U.S. at page 510, 68 S. Ct. at page 667, 92 L. Ed. 840: 'Though we can see nothing of any possible value to society in these [crime] magazines, they are as much entitled to the protection of free speech as the best of literature. . . . *They are equally subject to control if they are lewd, indecent, obscene or profane.*' (Italics supplied)".

See also *United States v. Harmon* (1891), 45 F. 414, 417,[14] wherein the language of the opinion is as fresh and applicable to the present case as though written yesterday.

Throughout his brief, appellant has endeavored to magnify possible consequences which he contends might occur as a result of enforcement of obscenity statutes in the field of thought and expression. He paints a picture of such statutes curbing "science, religion, politics and the arts,"[15] not to mention "Causing a sex revolution."[16] This, notwithstanding the fact that obscenity statutes have been part of the law of this country for many years, without the occurrence of any of these consequences. This argument of the conjecturable consequences of enforcement of a statute is effectively answered in *Beauharnais v. Illinois, supra*, 343 U.S. 250, 263; 96 L. Ed. 919, 930, where this court stated:

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[14]Infra, pp. 32-36, where the opinion is quoted at length.
[15]App. Br., p. 78.
[16]App. Br., p. 103.

> "We are warned that the choice open to the Illinois legislature here may be abused, that the law may be discriminatorily enforced; prohibiting libel of a creed or of a racial group, we are told, is but a step from prohibiting libel of a political party. Every power may be abused, but the possibility of abuse is a poor reason for denying Illinois the power to adopt measures against criminal libels sanctioned by centuries of Anglo-American law. 'While this Court sits' it retains and exercises authority to nullify action which encroaches on freedom of utterance under the guise of punishing libel. Of course discussion cannot be denied and the right, as well as the duty, of criticism must not be stifled.'"

Judge Learned Hand, in his often cited opinion in *United States v. Kennerley* (1913), 209 Fed. 119, 120, said:

> "I question whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas, and whether they will not believe that truth and beauty are too precious to society at large to be mutilated in the interests of those most likely to pervert them to base uses."

B. Obscenity Statutes Are Not Unconstitutionally Vague or Indefinite Under the Fourteenth Amendment.

The appellant has endeavored to demonstrate that the trems "obscene," "indecent," "lewd," "salacious," and terms of similar import, are unconstitutionally

vague and indefinite under the due process clause of the Fourteenth Amendment, and that, therefore, statutes which prohibit, regulate and restrict obscene, indecent, lewd and salacious matter are void.

It is respondent's position that these terms have a sufficient clear and definite interpretation, as reflected by many cases[17] over a long period of years, to resist this attack and further, that the definitions of such terms, in their nature, change and vary, dependent on the mores, ideals and customs of society at any given time. To restrict these terms unduly and to give a fixed interpretation of their meaning, at any such given period, would occasion the evil against which appellant argues so vehemently. But to define such terms within the framework of the community's current concept gives these statutes sufficient definiteness to protect both society from the evils inherent in the dissemination of obscene and pornographic matters, and also the rights of the persons who must meet the standards established by these statutes. As Judge Learned Hand so aptly put it in *United States v. Kennerley, supra,* 209 F. 119, 121:

> " . . . should not the word 'obscene' be allowed to indicate the present critical point in the compromise between candor and shame at which

[17]At p. 4 of Appellee's Statement Opposing Jurisdiction, and Motion to Dismiss or Affirm, the statement is erroneously made that "This court has upheld the validity of these federal statutes as not being unconstitutionally vague or indefinite." The error lies in the use of the word "upheld." Had the word "assumed" been used, the statement would have been accurate. The cases cited for the proposition, as correctly pointed out by appellant in his Brief in Opposition to Motion to Dismiss or Affirm, at p. 2, do not support the word "upheld" which implies a direct attack on the federal statute for vagueness.

the community may have arrived here and now? If letters must, like other kinds of conduct, be subject to the social sense of what is right, it would seem that a jury should in each case establish a standard much as they do in cases of negligence.

. . . .

"Nor is it an objection, I think that such an interpretation gives to the words of the statute a varying meaning from time to time. Such words as these do not embalm the precise morals of an age or place; while they presuppose that some things will always be shocking to the public taste, the vague subject matter is left to the gradual development of general notions about what is decent. A jury is especially the organ with which to feel the content comprised within such words at any given time, but to do so they must be free to follow the colloquial connotations which they have drawn up instinctively from life and common speech."

This court has recently noted "the impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime. . . . " (*Winters v. New York* (1948), 333 U.S. 507 at 518, 92 L. Ed. 840, 851.)

In *People v. Friedrich* (1943), 52 N.E. 2d 120, 122, (Illinois), the subject is treated as follows:

"The words 'obscene' and 'indecent' etc. are words of common usage and are ordinarily used in the sense of meaning something offensive to the chastity of mind, delicacy and purity of thought, something suggestive of lustfulness, lasciviousness and sensuality. It is a well-established rule that in the application of a statute, the words are to be given their generally-accepted meaning, unless there is something in the act which indicates that the legislature used them in a different sense and there is nothing in this act that indicates such intent. Defendant does not contend such words have a dual meaning but argues that one person might see vulgarity and indecency in a picture while another would give it cultural value and consider it a work of art. Such contention does not demonstrate uncertainty or vagueness in the meaning of the words used in the act but rather denotes a difference in the process of valuing the qualities of the picture. Most criminal acts are subject to such condition and each individual must determine for himself and at the risk of punishment, if his conclusion is erroneous, whether his acts constitute a violation of the statute. To the one who is about to engage in the sale of such pictures, the statute is clear as to what is prohibited. His only problem is as to whether the pictures are obscene and indecent. He may honestly conclude they are not and the court or jury determine that they were, but this does not render the statute void for vagueness or indefiniteness.

"In *Nash v. United States*, 229 U.S. 373, 33 S. Ct. 780, 781, 57 L. Ed. 1232, an attack similar to

the one made here was directed against an Act of Congress commonly known as the Sherman Act. Justice Holmes, speaking for the court said: 'And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. . . . . The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree. . . . We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act.' "

In the early, but well reasoned, case of *United States v. Harmon* (1891), supra, 45 F. 414, 417, the court discusses the term obscenity as follows:

"The statute does not undertake to define the meaning of the terms 'obscene', etc., further than may be implied by the succeeding phrase, 'or other publication of an indecent character.' On the well-recognized canon of construction these words are presumed to have been employed by the law-maker in their ordinary acceptation and use. As they cannot be said to have acquired any technical significance as applied to some particular matter, calling, or profession, but are terms of popular use, the court might perhaps with propriety leave their import to the presumed intelligence of the jury.

"Laws of this character are made for society in the aggregate, and not in particular. So, while there may be individuals and societies of men and women of peculiar notions or idiosyncrasies, whose moral sense would neither be depraved nor offended by the publication now under consideration, yet the exceptional sensibility, or want of sensibility, of such cannot be allowed as a standard by which its obscenity or indecency is to be tested. Rather is the test, what is the judgment of the aggregate sense of the community reached by it? What is its probable, reasonable effect on the sense of decency, purity, and chastity of society, extending to the family, made up of men and women, young boys and girls,—the family, which is the common nursery of mankind, the foundation rock upon which the State reposes? . . . Who is to deem, who is to judge, whether a given publication impinges upon the general sense of decency? . . . The answer to this is, that asserted violations of this statute, like other criminal statutes, must be left to the final arbiter under our system of government,—the courts. The jury, the legally constituted triers of the fact under the constitution, is to pass upon the question of fact. Under our institutions of government the panel of 12 are assumed to be the best and truest exponents of the public judgment of the common sense. Their selection and constitution proceed upon the theory that they most nearly represent the average intelligence, the common experience and sense, of the vicinage; and these qualifications they are presumed to carry with them into the jurybox, and apply this average judgment to the law and the facts. Sitting as the court does in this case, in the stead of the jury, it

may not apply to the facts its own method of analysis or process of reasoning as a judge, but should try to reflect in its findings the common experience, observation, and judgment of the jury of average intelligence. How would the language—the subject matter—in this article . . . impress and affect the average man and woman of intelligence and sensibility? What is its probable effect upon society in general? How would such language and matter impress a public assembly of decent men and women? How would it be received in and affect the average family circle of 1,500 subscribers to whom the evidence shows this garbage was sent? The subjects discussed and the language employed are too coarse and indecent for the man of average education and refinement to recapitulate. They are so filthy in thought and impure in terms as not to admit of recitation without a shock to the common sense of decency and modesty; and it does seem to me that it is not too much to say that no ordinary mind can subject itself to the repeated reading and contemplation of such subjects and language without risk of becoming indurated to all sense of modesty in speech and chastity in thought. The appetite for such literature increases with the feeding. The more it is pandered to, the more insatiable its craving for something yet more vicious in taste. And while it may be conceded to the contention of counsel that the federal government, under its constitutional limitations, ought not to take upon itself the office of *censor morum,* nor undertake to legislate in regulation of the private morals of the people, yet Congress may, as the basis of legislation of this

character, have regard to the common *concensus* of the people that a thing is *malum in se*,—is hurtful to the public welfare. . . . "

In the recent case of *Burke v. Kingsley Books supra*, 142 N.Y.S. 2d 735, 739, the court outlined the history of obscenity statutes as an aid to interpretation. The court, in part, stated:

"The act of obscenity has been an offense against the public order for centuries (See Sir Charles Sydlyes Case, I Keble 620 (K.B. 1663); Harris and Wilshire's Criminal Law, 16th ed., pp. 169-170; 1 Bishop on Criminal Law, 9th ed. Secs. 500, 504; Alpert, Judicial Censorship of Obscene Literature, 52 Harv. L. Rev. 40-43). Printed obscenity has been deemed a crime at common law for generations. *Commonwealth v. Holmes,* 17 Mass. 336; see Grant and Angoff, Massachusetts and Censorship, 10 Boston Univ. L. Rev. 52-56. . . . 'It is to be observed that the statute does not undertake to define obscene or indecent pictures or publications. But the words used in the statute are themselves descriptive. They are words in common use, and every person of ordinary intelligence understands their meaning.' *People v. Muller,* 96 N.Y. 408, 410.

"The fact that the mores of the times change from one generation to another, or that they are not the same in every land and clime, does not render the statutory definition meaningless. . . . It is now, however, necessary that the language be narrowed in such a manner as to allow no flexibility; rather ordinary terms may be used to express

ideas which adequately describe that which is prohibited when measured by the modes of common usage and understanding in the community. *Sproles v. Binford,* 286 U.S. 374, 393, 52 S. Ct. 581, 76 L. Ed. 1167; *Jordan v. De George,* 341 U.S. 223, 231-232, 71 S. Ct. 703, 95 L. Ed. 886.

"Repeated challenges to the definiteness of the term 'obscene' have been rejected. *Chaplinsky v. State of New Hampshire,* 315 U.S. 568, 571-572, 62 S. Ct. 766, 86 L. Ed. 1031; *American Civil Liberties Union v. City of Chicago,* 3 Ill. 2d 334, 347, 121 N.E. 2d 585; Lockhart and McClure, Literature, The Law of Obscenity, and The Constitution, 38 Minn. L. Rev. 295, 324-350. There is no question but that the term 'obscene' is sufficiently definite to be used—even in a criminal statute. *Winters v. People of State of New York,* 333 U.S. 507, 518, 68 S. Ct. 665, 92 L. Ed. 840. 'The Legislature has declared in this section (Penal Law, S. 1141) that no obscene, lewd, lascivious, or disgusting book shall be sold. Language could not be plainer.' "

See also *Besig v. United States* (1953), 208 F. 2d 142, 145, where the court, in discussing the problem of the definiteness of the word obscenity, said:

"The word 'obscene' is not uncommon and is used in English and American speech and writings as the word for indecent, smutty, lewd or salacious reference to parts of the human or animal body or to their functions or to the excrement therefrom.

. . . .

"Whether the moral conventions should be flaunted in the cause of frankness, art or realism,

we have no occasion to decide. That question is for the policy branches of the government. Nor do we understand that we have the legal power to hold that the statute authorizing the seizure of obscene books is inapplicable to books in which obscenity is an integral part of a literary work. . . . The civilization of our times holds to the premise that dirt in stark nakedness is not generally and at all times acceptable. And *the great mass of the people still believe there is such a thing as decency. Indecency is easily recognizable.*" (Emphasis added.)

The essence of the more recent interpretations of the courts in this connection is to regard materials "obscene" in the statutory sense, if its "dominant effect" is that of "dirt for dirt's sake," or as stated in *Dunlop v. United States* (1897), 165 U.S. 486 at 500, 41 L. Ed. 799, 804, whether the publication is " . . . calculated to excite those feelings which, in their proper field, are all right, but which, transcending the limits of that proper field, play most of the mischief in the world."

Definitions of obscenity, with their attendant rules of application, have been adopted by a large majority of American courts, and have been regarded as workable, strictly limited to works of pornography and in no way applicable to works of any literary value.[18]

[18]The following are a representative but by no means exhaustive selection:
New York:
Halsey v. N. Y. Society for the Suppression of Vice, 234 N.Y. 1, 136 N.E. 219 (1922) (judgment for plaintiff, seller of Gautier's *Mlle de Maupin*, in action for malicious prosecution).
People v. Wendling, 258 N.Y. 451, 180 N.E. 169, 81 A.L.R. 799 (1932)

The argument that appellant could not know what is considered criminal obscenity under the Penal statute until he was convicted, and that, therefore, the statute is

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(play *Frankie and Johnnie* held not obscene).
People v. Viking Press, 147 Misc. 813, 264 N.Y.S. 534 (1933) (Caldwell's *God's Little Acre* held not obscene).
People v. Miller, 155 Misc. 446, 279 N.Y.S. 583 (1935) (Flaubert's *November* held not obscene).
People v. Gotham's Book Mart, 158 Misc. 240, 285 N.Y.S. 563 (1936) (Gide's *If It Die* held not obscene).
People v. Larsen (Ct. Spec. Sess.), 5 N.Y.S. 2d 55 (1938) (Stills from movie *Birth of a Baby* held not obscene).
People v. Vanguard's Press, 192 Misc. 127, 84 N.Y.S. 2d 427 (1947) (Willingham's *End as a Man* held not obscene).
Sunshine Book Co. v. McCaffrey (Sup. Ct., Spec. Term), 112 N.Y.S. 2d 476 (1952) (Magazine *Sunshine and Health* held obscene).
Brown v. Kingsley Books, Inc., et al., 1 N.Y. 2d 177, 134 N.E. 2d 461 (1956) (Issue here was constitutional, but Court in passing affirmed judgment below that pamphlets called *Nights of Horror* were obscene).

Delaware:
State v. Scope, (Sup'r. Ct. Del.) 86 A. 2d 154 (1952) (A burlesque movie held obscene under "dirt for dirt's sake" test).

Massachusetts:
Commonwealth v. Isenstadt, 318 Mass. 543, 62 N.E. 2d 840 (1945). This is the leading Massachusetts case, and combines the modern "dominant effect" test with the old "deprave and corrupt" test of the *Hicklin* rule, 62 N.E. 2d at 844, with the result that Lillian Smith's *Strange Fruit* was held obscene. See also *Attorney General v. Book Named God's Little Acre*, 326 Mass. 281, 93 N.E. 2d 819 (1950)

Ohio:
State v. Lerner, (Ohio Comm. Pl.), 81 N.E. 2d 282 (1948) (*Sunshine and Health* and strip tease photographs held not obscene).
New American Library of World Literature, Inc. v. Allen, 114 F. Supp. 823 (N.D. Ohio 1953) (Upholding Youngstown obscenity ordinance).

Pennsylvania:
The leading case is *Commonwealth v. Gordon*, 66 (Pa.) D. & C. 101 (1949), aff'd *Commonwealth v. Feigenbaum*, 166 Pa. Super. 120, 70 A. 2d 389 (1950). (Upholding constitutionality of Pennsylvania obscene literature statute as construed).

New Jersey:
State v. Weiterhausen, 11 N.J. Super. 487, 78 A. 2d 495 (1951) (Nude photographs held obscene).
Adams Theatre Co. v. Keenan, et al, 12 N.J. 267, 92 A. 2d 519 (1953).
McFadden's Lounge, Inc. v. Division of Alcoholic Beverage Control, 33 N.J. Super. 61, 109 A. 2d 444 (1954).
Adams Newark Theatre Co. v. City of Newark, 22 N.J. 472, 126 A. 2d 340 (1956).

Illinois:
People v. Friedrich, 385 Ill. 175, 52 N.E. 2d 120 (1943).
American Civil Liberties Union v. City of Chicago, 3 Ill. 2d 334, 121 N.E. 2d 585 (1954), appeal dismissed 348 U.S. 979, 99 L.Ed. 763, 75 S. Ct. 572 (1955) (upholding constitutionality of film censorship ordinance).

unconstitutionally vague, is fallacious.[19] There are many statutes which depend upon the judgment of a party prior to an act, and which hold him criminally responsible if he is wrong in his judgment.

Among the oldest concepts of the law, enacted in various statutory contexts, are those of negligence and insanity, and it is a matter of common knowledge that jurors will disagree as to the standard of "the reasonable man" in applying the first, and qualified medical experts will arrive at opposite conclusion, in applying the second. In both instances greater verbal precision cannot be achieved.

Examples of such statutes which have been appealed to this court, wherein unsuccessful attacks were made on their definitenes, are:

Statute prohibiting publications which libel and attack "citizens of any race, color, creed or religion." (*Beauharnais v. Illinois, supra,* 96 L.Ed. 919, 343 U.S. 250); statute prohibiting use of "offensive, derisive or annoying words" or "names" to any person lawfully on a public street. (*Chaplinsky v. New Hampshire supra,* 86 L.Ed. 1031, 315 U.S. 568.) The penalizing of "excessive charges" for service in connection with home loans (*Kay v. United States* (1938), 82 L. Ed. 607, 303 U.S. 1); the making of "loud and raucous" noises (*Kovacs v. Cooper* (1949), 93 L. Ed. 513, 336 U.S. 77); anti-trust legislation which denounced "contracts and

[19] "An analysis of the meaning of the adjectives appearing in this section will serve no useful purpose and there is an inherent impossibility of verbal precision in matters of this kind." *People v. Larsen* (1938), 5 N.Y.S. 2d 55 at 56, a case arising under N.Y. Penal Code, Sec. 1141 (obscenity statute).

arrangements 'reasonably calculated' to fix and regulate the price of commodities, etc." (*Waters-Pierce Oil Company v. Texas* (1909), 53 L. Ed. 417, 212 U.S. 86); a statute providing that "any person who willfully attempts in any manner to evade or defeat any tax . . . or the payment thereof . . . be guilty of a felony." (*United States v. Ragen* (1942), 86 L. Ed. 383, 314 U.S. 513); the term "political purposes" (*United States v. Wurzbach* (1930), 74 L. Ed. 508, 510, 380 U.S. 396, 399), wherein this court, through Justice Holmes, stated:

> "The other objection is to the meaning of 'political purposes.' This would be open even if we accepted the limitations that would make the law satisfactory to the respondent's counsel. But we imagine that no one not in search of trouble would feel any. Wherever the law draws a line there will be cases very near each other on opposite sides. The precise course of the line may be uncertain, but no one can come near it without knowing that he does so, if he thinks, and if he does so it is familiar to the criminal law to make him take the risk."

In *United States v. Alford* (1927), 71 L. Ed. 1040, 1041, 274 U.S. 264, 267, this court stated:

> "The word 'near' is not too indefinite. Taken in connection with the danger to be prevented it lays down a plain enough rule of conduct for anyone who seeks to obey the law."

In *Omaechevarria v. Idaho* (1918), 62 L. Ed. 763,

768, 246 U.S. 343, 348, the word "range" without further definition was upheld. This court stated:

> "Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it. Similar expressions are common in the criminal statutes of other states. This statute presents no greater uncertainty or difficulty, in application to necessarily varying facts, than has been repeatedly sanctioned by this Court."

In *Kovacs v. Cooper, supra,* 93 L.Ed. 513, 518, 336 U.S. 77, 79, this court, in passing upon the question of definiteness, stated:

> "The contention that the section is so vague, obscure and indefinite as to be unenforceable merits only a passing reference. This objection centers around the use of the words 'loud and raucous.' While these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden."

Similarly, the common law offense of vagrancy, now commonly enlarged upon by statute, has been held within the police power affecting public health and morals as a proper subject for criminal sanction, notwithstanding contentions that terms such as "every lewd or disorderly person" do not define the elements of the crime; or that words such as "roaming" and "idling" are too broad and indefinite to state a public

offense.[20] In *State v. Harlow* (1933), 174 Wash. 227, 24 P. 2d 601 at 604, the court, in upholding a vagrancy statute as against the contention that it was void for vagueness, said:

> "The terms 'lewd', 'disorderly', and 'dissolute' have no statutory definition. They are words, however, of common and general use, and are easily understood by men and women of average intelligence. We doubt whether definition could make them any clearer."

Again, breach of the peace statutes, which commonly prohibit the use of vulgar and indecent language in specified circumstances, have been upheld against the argument that they are fatally uncertain and set up no ascertainable standards of guilt.[21]

A more striking example of the impossibility of verbal precision is illustrated by the problems posed by the definitions of first and second degree murder. In these cases the defendant's life is at stake, and yet it is generally conceded that the application of these definitions permits the widest scope of a jury's discretion.[22]

There are certain matters which come within the definition of obscenity, so definite and certain as to occasion no argument, and which have been universally and uniformly so recognized.

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[20]See, for example, *Ex parte McCue* (1908), 7 Cal. App. 765, 96 P. 110; *Ex parte Cutler* (1934), 1 Cal. App. 2d 273, 36 P. 2d 441.

[21]See, for example, *People v. Vaughn* (1944), 65 Cal. App. 2d Supp. 844, 150 P. 2d 964.

[22]"Homicide—Murder—Intent to Kill as Affecting the Degree of Murder" (1951), 24 S. Cal. Law Rev. 288; a good illustration of the problem is *People v. Holt* (1944), 25 Cal. 2d 59, 153 P. 2d 21.

No one questions that pictures or literature which portray acts of sodomy, buggery, coprophilia, necrophilia and other unnatural sexual acts, come within the definition of obscenity. Nor can anyone seriously argue that the active portrayal of these acts, or of sexual intercourse or homosexual activity, on television, in motion pictures or otherwise, would not be universally considered obscene.

At the other end of the scale there are situations which today are not considered obscene, but which might have been so considered during the Victorian period. For example, depictions of women in brief bathing suits, or illustrations of women and men embracing or kissing.

Such changes of standards are reflected graphically by evolving definitions of various terms. This is not only true as to the term "obscenity", but also in the use of other terms; for example: speed, height and modesty. These terms have all changed within recent memory, but each has a well recognized and definite meaning today, as do the terms which are presently under attack.

Lying between the black and white of obscenity and purity there is a field of gray supplying a reason and purpose for juries and a court. In the field of obscenity there is an area where an individual knows he must tread lightly, so close to the line that the determination must necessarily be made by the triers of fact in the courts. The fact that an individual who takes the

risk of adventure into the gray zone, is found to be in violation of a statute prohibiting obscenity, does not render its standard vague or indefinite under constitutional guarantees.[23]

Both the Federal[24] and the State Courts have, in countless instances, held the term "obscene" as used in criminal statutes worded similarly to California Penal Code Section 311, subdivision 3 sufficiently definite and certain for due process requirements. The cases in the note below[25] are not an exhaustive compilation, but they represent the present day approach to the problem, which recognizes frankly that "the concept of obscenity remains elusive."

In *United States v. Harris* (1954), 98 L. Ed. 989, 347 U.S. 612, this court stated, at L. Ed. 996:

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[23]It should be noted in passing that certain statutory phrases have posed somewhat different problem with respect to the vagueness concept. These involve words which are capable of being understood in either of two or more distinct senses, and the statute in question has not made clear which sense was intended. See *Lanzetta v. New Jersey* (1939), 306 U.S. 451, 83 L.Ed. 888; *Burstyn v. Wilson* (1952), 343 U.S. 495, 96 L.Ed. 1098; also cf. *U. S. v. Cardiff* (1952), 344 U.S. 174, 97 L.Ed. 200.

[24]Although not in this court. As previously noted (p. 29), this court has assumed, but not squarely held, the constitutionality of these terms, as here attacked.

[25]Cases holding or noting the word "obscene" in a criminal statute sufficiently definite for due process requirements:

Federal:

Rosen v. U. S. (1895), 161 U.S. 29 at 42, 40 L.Ed. 606, 610, "Everyone . . . must take notice of what, in this enlightened age, is meant by decency, purity and chastity in social life, and what must be deemed obscene, lewd, and lascivious."

Tyomies Publishing Co. v. U.S. (1914), 211 F. 385.

U. S. v. Dennett (1930), 39 F. 2d 564.

U. S. v. Rebhuhn (1940), 109 F. 2d 512, cert. den.

Rebhuhn v. U. S., 310 U.S. 629, 84 L.Ed. 1399.

New American Library of World Literature, Inc. v. Allen et al (1953), 114 F. Supp. 823, 829: "It thus appears that the trend of authoritative judicial thinking supports the view that the word 'obscene' as used in a criminal statute or ordinance is sufficiently precise to meet the constitutional standards of certainty." 109 F. 2d at 829.

Bonica v. Oleson (1954), 126 F. Supp. 398, 402 (S.D. Cal.): "A determination of the national standard of decency and modesty is not an easy one . . . And yet, almost every aspect of our day-to-day

"If the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise . . . and if this general class of offenses can be made constitutionally definite by a reasonable construction of the statute, this court is under a duty to give the statute that construction."

In *Hallmark Productions v. Mosley* (1951), 190 Fed. 2d 904, 909-910, the following statement is made with reference to the definiteness of the word obscenity.:

"The term obscene is confessedly not susceptible of an exact definition universally applicable. . . . In *Hadley v. State,* 205 Ark. 1027, 172 S.W. 2d 237, 239, the court, among other things, said:

"'The word "Obscene" not being a technical

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conduct is judged by equally vague standards of 'the reasonable man'." 126 F. Supp. at 402.

Times Film Corp. v. Chicago (1956), 139 F. Supp. 837, 841: If "obscene" is held to be too vague, ". . . the State's police power in the area of health and morals, which has always enjoyed constitutional sanction, will be seriously invaded and reduced. . . ." 139 F. Supp. at 841.

State:

People v. Friedrich (1944), 385 Ill. 175, 52 N.E. 2d 120.

State v. Lerner (Ohio Comm. Pl. (1948)), 81 N.E. 2d 282: "The community concept of what is 'obscene' literature is approximately ascertainable." 81 N.E. 2d at 289.

Sunshine Book Co. v. McCaffrey (1952), 112 N.Y.S. 2d 476: "The test of decency is the fair judgment of reasonable adults in the community. The validity of such a test is well recognized in our jurisprudence, and the fact that there are variations depending upon the mores of the community does not destroy it." 112 N.Y.S. 2d at 481.

American Civil Liberties Union v. City of Chicago (1954), 3 Ill. 2d 334, 121 N.E. 2d 585, appeal dismissed 348 U.S. 979, 99 L.Ed. 763, 75 S. Ct. 572 (1955): "We conclude, therefore, that the term 'obscene' has achieved a sufficiently precise meaning to describe a class of films which the State may validly suppress; the subject matter hardly admits of greater definiteness." 121 N.E. 2d at 592.

term of the law, and not being susceptible of exact definition in its judicial or legal use, this question must in any given case be submitted to the jury as a question of fact and the finding of the court, sitting as a jury, in the instant case may not be disturbed if that finding is sustained by testimony sufficient to support that conclusion by an ordinary man of average intelligence.' . . .

"In *Towne v. Eisner,* 245 U.S. 418, 38 Supreme Court, 158, 159, 62 Law Ed. 372, the Supreme Court, speaking through the late Mr. Justice Holmes, said:

" 'A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.' "

Even though the terms obscene, indecent, lewd and terms of similar import have been utilized in laws and statutes ever since the early common law, and in statutes of every State (except New Mexico), and every territory (except Alaska), and by the federal government, and even though the average person can readily recognize examples of obscenity, appellant feels that those terms are too vague for him to understand, stating it can only be defined by "cautological abstractions." Appellant further infers that all such statutes, no matter how worded, would be indefinite, stating:

"We would be less than candid if we denied that we believe that all statutes which seek to regulate 'sexual impurity' in the minds of men, offend the constitution." (App. Br., p. 43.)

On the other hand are the possible consequences arising in the event that the present laws which prohibit and regulate obscenity are declared invalid. It would be difficult, if not impossible, to frame a statute, curbing the type of literature and other objects herein involved, without utilizing the terms obscene, lewd, indecent, salacious or similar terms.

Thus, if appellant is correct in his "candid" belief that all possible statutes seeking to regulate "sexual purity" would offend the Constitution,[26] a decision of this court voiding the present measure hereunder attack would furnish the peddlers of pornography with carte blanche to inundate the nation with their filth.

In *United States v. Patrillo* (1947), 91 L. Ed. 1877, 1882; 332 U.S. 1, 7, this court was faced with a similar contention with reference to a different type of statute and stated:

> "Clearer and more precise language might have been framed by Congress to express what it meant by 'number of employees needed.' But none occurs to us, nor has any better language been suggested, effectively to carry out what appears to have been the Congressional purpose. The argument really seems to be that it is impossible for a jury or court ever to determine how many employees a business needs, and that, therefore, no statutory language could meet the problem Congress had in mind. If this argument should be accepted, the result would be that no legislature could make it an offense for a person to compel another

[26] App. Br., p. 43.

to hire employees, no matter how unnecessary they were, and however desirable a legislature might consider suppression of the practice to be.

"The Constitution presents no such insuperable obstacle to legislation. We think that the language Congress used provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judges and juries fairly to administer the law in accordance with the will of Congress. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense. *Robinson v. United States,* 324 U.S. 282, 285, 286, 89 L.ed. 944, 946, 947, 65 S. Ct. 666. It would strain the requirement for certainty in criminal law standards too near the breaking point to say that it was impossible judicially to determine whether a person knew when he was willfully attempting to compel another to hire unneeded employees. See *Screws v. United States,* 325 U.S. 91, 89 L. Ed. 1495, 65 S. Ct. 1031, 162 A.L.R. 1330; *United States v. Ragen,* 314 U.S. 513, 522, 524, 525, 86 L. Ed. 383, 389-391, 62 S. Ct. 374. The constitution has erected procedural safeguards to protect against conviction for crime except for violation of laws which have clearly defined conduct thereafter to be punished; but the Constitution does not require impossible standards.

"The language here challenged conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding

and practices. The Constitution requires no more."

C. The Facts of the Instant Case Exemplify a Valid Exercise of the Police Power of the State Which Does Not Encroach On Any Right of Appellant Under the Constitution.

At pages 12 to 14 of the Transcript of Record appears an "analysis of Exhibits," originally prepared for the use of counsel for respondent and, at the request of the Appellate Department of the Superior Court of Los Angeles County, transmitted to that court, for its convenience in analyzing the exhibits. It may be useful to this court for the same purpose.

Respondent respectfully directs the attention of this court to the references under the column headed "Degree of Obscenity and References" and especially to those items characterized, "X Very Obscene."[27] This will avoid embarrassment to the not-too-easily-embarrassed counsel for appellee in dictating to their stenographers, which would result from quoting from exhibits to illustrate their indubitable obscenity.

There is one aspect of the exhibits that we have not found present in any other case we have examined: This is reflected by the symbols "X"[28] and "@" in the Analysis. Those designated "@" are plainly designed

[27]Exhibits 5, (9), 11, 12, 21 and 22. These we consider most obscene. However, we do not mean to imply that there are not many other such items in these exhibits, at other pages, and in other exhibits.

[28]Designated as "Heterosexual" (R. 14), somewhat ineptly selected for lack of an antonym for sado-masochistic. It is not intended to infer that sado-masochistic sexual activity might not, in itself, be either homosexual or heterosexual, as is indeed reflected by exhibits which portray both situations.

and intended to cater to sado-masochistic appetites. A glance at the nature of the activity therein portrayed verifies this statement.

That activity consists of two classes of occurrences. Those between persons of the same sex,[29] and those of different sexes,[30] spanking, beating, hair pulling, whipping and lashing, frequently of women tied to chairs, pillars or other structures, and invariably depicting the women involved, in both the active and passive roles, as scantily clothed, with full and voluptuous figures straining and bursting through ragged garments. Some,[31] less directly sexual, aimed perhaps at a different class of sexual pervert, describe scenes of torture and cruelty in a pseudo-historical fashion, concerning incidents not overtly sexual, but in a gloating, salacious manner, well reflected by the title, "The Pleasures of the Torture Chamber."

There are judicial opinions on the subject of obscenity which discuss the effect of articles of that nature upon hypothetical individuals. This consideration, of course, brings into the picture the wide difference in human beings in manner and degree of response to sexual stimulus; ranging from the repulsion of the frigid to the hair trigger response of the nymphomaniac and the satyromaniac and, as to source, from the most conventional of aphrodisiacs to the obscurely esoteric. Concluding that the vast majority of the

[29]For example, Exhibits 4, "Tina's Torture"; Exhibits 13, 14, 15, and 16.
[30]For example: Exhibits 21 and 22.
[31]Exhibit 9.

population falls well between these extremes, their opinions speak of such effects on the normal individual.

In each instance, however, since the matters under consideration in these cases probably catered only to unperverted, or at least non sado masochistic appetites, it is apparent that the court's use of the word "normal," or the equivalent, is with reference to the degree of response and susceptibility, and not the direction of the sexual response of the hypothetical person affected.

Appellee concludes that these courts did not intend only to include in their definition (and therefore condemn) that which tends to appeal to the non-perverted sexual taste, and exclude (thereby exculpating) that aimed at the sordid exploitation of perversion (as do many of the items of appellant's stock in trade which are in evidence in this case).

It is also apparent from the exhibits that appellant, in preparing his wares, was keenly aware that the distinction is not necessarily sharp between classes of deviation of sexual appetites; that sado masochistic activity is found coexistent with heterosexuality, homosexuality and every degree of so-called bisexuality.

This pandering to the warped, the neurotic, the emotionally disturbed and distorted individual, by the exploitation for profit of the most vicious of human aberrations, seems a far cry from the matters intended by the authors of the First Amendment of the Constitution to be protected as exercises of free speech and a free press.

For freedom of speech "there is no necessity 'to satisfy all tastes, no matter how perverted.' (*Hannegan v. Esquire, Inc.*, supra, 327 U.S. 146, 158.)" (*Brown v. Kingsley Books* (1956), 1 N.Y. 2d 177, 188.)

When considered with some of the other exhibits, which represent the very acme of obscenity in its ordinary sense, this commercialization of perversion, weighed and considered as to its "social value," as the term is used in judging applicability of the First Amendment, seems irreducible.

See also *Chaplinsky v. State of New Hampshire*, supra, 315 U.S. 568, 571-572, 86 L.Ed. 1031, 1035.

In the principle opinion of the consolidated companion case, *United States v. Roth* (1957), 237 Fed. 2d 796, 799, that court might well have been speaking of this aspect of the exhibits in the instant case, when it said:

> "A serious problem does arise when real literature is censored; but in this case no such issue should arise, since the record shows only saleable pornography."

Appellant stresses, as he did in the Appellate Division of the Superior Court (R. 15), that the trial court "found" Exhibit 5 (which includes some of the most obscene matter in the case), not to be obscene. (App. Br., p. 12.)

Appellant's reference to R. 86-88 (as well as a search of the record for any other such comment) in-

dicates that appellant bases his contention on a comment made by the trial court during a discussion prior to his denying appellant's motion to dismiss. At that time, the court stated:

> " . . . They also have reference to 'French love stories, racy, risky—as only the French know how.' So you can see to whom the defendants are appealing in this ad.
>
> "However, getting back to the booklets themselves, as to whether they in themselves are obscene, the court would hesitate in saying so because the books in themselves, I don't believe are obscene, though there is much in these books which in the hands of persons who are desirous of having their lustful passions aroused, they would get a lot of valuable material out of them." (R. 88.)

Assuming that the words, "booklets themselves", refer to Exhibit 5, it must be noted that this statement was made by the court at 12:00 o'clock noon of June 10, 1955, at the end of the prosecution's case, just prior to denying appellant's motion to dismiss (R. 93), and that at that time the court had "not read all of them (the eight booklets composing Exhibit 5) through." (R. 86.)

The court adjudged appellant guilty just before 3:55 p.m. of the same date. (R. 118.)

When a trial without a jury has resulted in a verdict or finding of guilty, all presumptions are in favor of that verdict.

In this situation an appellate court will indulge all reasonable presumptions in favor of the correctness of the judgment or verdict of the trial court (*Pasadena Research Laboratories v. United States*, C.C.A. 9th (1948), 169 F. 2d 375, 380, certiorari denied, 335 U.S. 853, 93 L. Ed. 401; *Zahn v. Hudspeth* (1939), 102 F. 2d 759, 762, certiorari denied 307 U.S. 642, 83 L. Ed. 1522), and will presume that the proceedings had in the progress of the cause, were regular and free from error. (See 24 C.J.S. 707, Criminal Law, Sec. 1849.)

It is well settled in California that remarks by the judge during the course of the trial or even in a formal "opinion", which are inconsistent with the ultimate judgment are not available on appeal to "impeach the finding" (*Nemec v. Polley* (1954), 129 Cal. App. 2d 453, 456) and are "not, strictly speaking, a part of the record," and therefore not available for any purpose. See *People v. Grana* (1934), 1 Cal. 2d 565, 570, wherein the court stated:

> "' . . . It seems clear to us that neither the court's remarks during trial nor his concluding "opinion" can be resorted to on appeal in any way as findings, conclusions of law, instructions or remarks as though to a jury. . . . '"

See[32] also *One, Inc. v. Otto K. Olesen*, supra, No. 15139, ... F. 2d ..... (Ninth Circuit), wherein the Cir-

[32]In Appendix.

cuit Court considered exhibits in addition to those designated by the trial court as obscene.

Therefore, the trial court is presumed to have inspected and read all of the exhibits (as he may well have done subsequent to the remarks quoted, and prior to the time of the judgment) and to have based his judgment on all of the evidence.

Among the booklets constituting Exhibit 5 (which respondent considers among the most obscene of the exhibits), there are nine purporting, superficially, to be of scientific interest. (R. 86.) The advertisement for these same booklets (Exhibit 3 and R. 86, 87), however, asks, "Are ordinary novels too tame for you?", announces, "Banned by Bigots Who Cannot Stand the Meaning of the Word 'Sex.' But available To You If You Hurry," and concludes, "Note: We make every possible effort to prevent these books from reaching young people or persons who would use them for the fulfillment of indecent desires." (R. 87.) Another advertisement, depicting one nude girl running and another lying down, says, "Wild French Cartoons. You'll giggle . . . you'll gasp . . . you'll pop an eyebrow . . . for these are the no-holds-barred French cartoons you've heard so much about." (R. 88.) The trial court commented, "I don't think they would be sending this to a mailing lists of doctors or psychologists who were interested in the subject matter covered by these books from a serious standpoint." (R. 88.)

Judge Learned Hand expressed our contention in this regard, with his usual skill, in *United States v. Rebhuhn* (1940), 109 F. 2d 512, 514, where he states:

> "However, in the case at bar, . . . the defendants had indiscriminately flooded the mails with advertisements, plainly designed merely to catch the prurient, though under the guise of distributing works of scientific or literary merit. We do not mean that the distributor of such works is charged with a duty to insure that they shall reach only proper hands, nor need we say what care he must use, for these defendants exceeded any possible limits; the circulars were no more than appeals to the salaciously disposed, and no sensible jury could have failed to pierce the fragile screen, set up to cover that purpose."

The portion of Exhibit 3, the advertisement, that: "Note: We make every possible effort to prevent these books from reaching young people or persons who would use them for the fulfillment of indecent desires," (R. 87), is a remarkably frank admission of appellant (who caused it to be prepared (R. 105, 106) that his wares have "a substantial tendency to deprave or corrupt its readers by inciting lascivious thoughts or arousing lustful desires," the standard quoted by the same court of last resort of California (In *People v. Wepplo* (1947), 78 Cal. App. 2d Supp. 959, 961[33]) which affirmed the conviction in the instant case.

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[33]It should be noted that the case was reversed for other reasons, that, therefore, the standard is stated as pure dictum and is not, strictly speaking, an "interpretation" (App. Br., p. 4), a "construing" (App. Br., pp. 22, 23), a "construction" (App. Br., pp. 47, 68); authority for most of appellant's conclusions in his footnote 25 at p. 73 of his brief, or adoption "of the Massachusetts definition" (App. Br., p. 118) as concluded by appellant.

Apropos are the remarks of the court in *United States v. Hornick* (1955), 131 F. Supp. 603, 604:

> "Weighing heavily against the defendants at bar are the two advertising circulars sent in sequence through the mails. This familiar plan capitalizes on a human trait to sample forbidden fruit. The preliminary circular was certainly designed to encourage prospects, including the adolescent and perverted, to purchase 'Sex-sational' pictures. The succeeding circular, accompanying delivery of the first group of pictures (the obscenity of which we doubted), was mailed to 'Our Exclusive Mailing List Customers.' It solicited orders of 'Better' pictures which 'cannot be sent through the mail' and are 'Not Sold to Minors.' In our judgment, this insidious background, which commercializes on sex, panders to the lewd, and tempts the young, taints with obscenity the second group of pictures of naked women delivered by Railway Express."

Nor is the prosecution's case confined to writings. Also included is a colored, three dimensional (stereo), picture which depicts a nude girl, kneeling, with a rubber duck between her legs. Another such picture shows a nude girl kneeling with each of two very large breasts in a correspondingly large champagne glass. Another variation shows another nude girl with two very large breasts hanging over a tennis or fishing net (Exhibit 12, R. 90, 91). The trial court stated, with reference to these three pictures, succinctly, "In my opinion, that is obscene." (R. 91.)

In *One, Inc. v. Otto K. Olesen* (supra), No. 15139 ..... F. 2d .....,[34] the Ninth Circuit Court might have been discussing the exhibits in this case when it said:

> "It is dirty, vulgar and offensive to the moral senses. . . . The magazine under consideration, by reason of the articles referred to, has a primary purpose of exciting lust, lewd and lascivious thoughts and sensual desires in the minds of the persons reading it. Moreover, such articles are morally depraving and debasing. The articles mentioned are sufficient to label the magazine as a whole, obscene and filthy."

Respondent submits that all of the exhibits discussed under this heading, the writings and the pictures, together with those not specifically noted, place this case in a far different category from those where there is the contention, or the possible conclusion, that art, or beauty in picture, statue or writing, are obscene. Such cases have given rise to extended and honest debate which consists, essentially, in comparing the social value of the particular application of freedom of speech and the press, with the damage to society of the matters attempted to be proscribed.

Here, in this case, is nothing of the slightest social value—no art, no beauty, no literature of even the most dubious value, no scientific information of value to students or honest inquirers (and, to give appellant his due, he does not, and has not, at any stage of the case, claimed any of these things for his wares), noth-

[34] See Appendix.

ing but unmitigated filth, affirmatively harmful to morals and conduct, all part of a sordid commercial attempt to make profit of perverted prurience and snide salacity.

Appellee has difficulty in resisting the conclusion that appellant's zeal is based more on an avaricious desire to continue the flow of profits from the pennies of perverts and the dollars of the depraved, than in a crusade for "freedom, especially for art and literature to express themselves unrestrictedly; and freedom for each man in society to be free as an individual to reach social judgments on all matters including standards of morality."[35]

Respondent submits that better examples of a proper exercise of the police power of the state, which in no way encroach upon proper exercise of the freedoms guaranteed by the First Amendment, would be difficult to hypothecate.

D. The California Statute Does Not Impose Prior Restraint or Censorship.

Appellant argues that there is no basic difference between prior restraint, censorship and subsequent punishment in the field of freedom of press and speech, and that therefore the authorities and doctrines with respect to prior restraints or censorship are equally applicable to the facts of the instant case, involving only subsequent punishment. (App. Br., pp. 26-29.)

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[35]App. Br., p. 102.

It is appellee's contention that there is a well recognized distinction between prior restraints and censorship, and subsequent punishment.

Prior restraint pre-supposes a censor. If the censor disapproves of a writing or publication the burden is on the censored party in seeking redress. Under the California statute here involved (Section 311 of the Penal Code), approval is not required before publishing or disseminating words. On the contrary, one may publish or disseminate anything desired, the only limitation arises from the possibility of prosecution if the matter is found to be obscene or in contravention of another criminal statute. The determination of what is obscene or indecedent does not constitute a prior restraint but a decision of a court and jury. The burden is on the prosecution to show that the matter is obscene and the defendant enjoys the presumption of innocence and other judicial safeguards. If appellant, in the instant case, had desired, he had the right to have a jury decide whether the subject matter was in fact obscene. To argue that this judicial process is equivalent to censorship is a distortion of the entire judicial system.

In *Joseph Burstyn, Inc. v. Wilson* (1952), 343 U.S. 495, 503, 96 L.Ed. 1098, 1106, passing on the licensing of motion pictures "prior to their being shown," this court stated:

> "The statute involved here does not seek to punish, as a past offense, speech or writing falling within the permissible scope of subsequent punish-

ment. On the contrary, New York requires that permission to communicate ideas be obtained in advance from state officials who judge the contents of the words and pictures sought to be communicated. This court recognized many years ago that such a previous restraint is a form of infringement upon freedom of expression to be especially condemned. *Near v. Minnesota*, 283 U.S. 697, 75 L.Ed. 1357, 51 S. Ct. 625 (1931). The court there recounted the history which indicates that a major purpose of the First Amendment guarantee of a free press was to prevent prior restraints upon publication, although it was carefully pointed out that the liberty of the press is not limited to that protection. It was further stated that 'the protection even as to previous restraint is not absolutely unlimited.' "

Subsequent punishment gives the wrong doer the choice of doing an act and paying for it, if it is wrong under a criminal statute, or of not doing it. The mere intent to do a criminal act is not a crime, nor is preparation, unless the preparation has reached the proportion of an actual attempt. In this regard, the California statute on obscenity is no different from statutes punishing Burglary, Robbery, Murder or other crimes. It is the act and not the idea that is condemned. Appellant was prohibited from keeping and advertising obscene or indecent literature for sale. The burden was on the prosecution to prove the elements of the crime and appellant had all the judicial protection of a trial. In fact, appellant is invoking such protective procedures by his appeal to this court.

III.

THE FEDERAL POSTAL POWER HAS NO APPLICATION IN THE INSTANT CASE.

The appellant contends that Section 311 of the Penal Code, as applied in the instant case, encroaches on the postal powers of the Federal Government. (App. Br. pp. 108-120.)

The appellant here is not being punished under any federal statute. He has been tried and convicted in a state court, under a state law, having for its object the prevention of keeping for sale or advertising for sale any obscene or indecent book as denounced in Section 311 of the Penal Code.

The state has authority to protect the public morals and welfare of its citizens even from an act also prohibited under federal law. *(People v. Grosofsky* (1946), 73 Cal. App. 2d 15.) The power to pass laws for the restraint and punishment of crime, for the preservation of the health and morals of its citizens, has never been surrendered by the states or restrained by the Constitution of the United States. *(People v. McDannell* (1889), 80 Cal. 285, 291.)

It is immaterial whether the appellant made use of the United States mails to advertise and distribute his obscene wares. As the court of last resort in California stated in its opinion (R. 19, 20):

> "The circumstance that the defendant made use of the United States mails to advertise and to

distribute his obscene wares—and that some of his books were obscene we do not consider debatable—does not render the state statute (section 311) inoperative. (See *In re Phoedovius* (1918), 177 Cal. 238, 246, 170 Pac. 412; *Zinn v. State* (1908), 88 Ark. 273, 114 S.W. 227, 228; *Ex parte Williams* (1940), 345 Mo. 1121, 139 S.W. 2d 485, 491 (which cites *In re Phoedovius, supra;* certiorari denied in U. S. Supreme Court, 311 U.S. 675, 85 L. ed. 434); *Railway Mail Ass'n v. Corsi* (1945), 326 U.S. 88, 95, 89 L. ed. 2072, 2077.)"

Furthermore, the same act may constitute an offense equally against the United States and the State. (*Pettibone v. United States* (1893), 148 U.S. 197, 37 L.Ed. 419; *Cross v. North Carolina* (1889), 132 U.S. 131, 33 L.Ed. 287; *State v. Cioffe* (1943), 130 N.J.L. 160; 32 A. 2d 79; *State v. Moore* (1909), 143 Iowa 240, 121 N.W. 1052; 15 Am. Jur., p. 68.)

In 15 Am. Jur. at p. 68, Section 394, citing many cases, it is stated:

"As a general rule, since the same act may constitute a violation of both federal and state laws, a conviction or acquittal in one jurisdiction will not prevent prosecution in the other."

The instant case is not a contest for jurisdiction over the person between the federal and state courts. (*People v. Branch* (1955), 134 Cal. App. 2d 572, 573.)

We submit that the appellant's contention, that the offenses of which he was charged and convicted, are

subject to exclusive federal jurisdiction and that the state has no power in this area, is without merit.

IV.

ANSWER TO BRIEF FILED BY AMICUS CURIAE

The American Civil Liberties has filed a brief as *Amicus Curiae* on behalf of the appellant in this matter. No new material appears in that brief.

In answer, we adopt the language of the court in *United States v. Two Obscene Books, supra,* 92 F. Supp. 934, 935, wherein it is stated:

> "I am at a loss to perceive what could prompt the representative of the American Civil Liberties Union to urge the court to permit the introduction into this country of books of this kind. 'Civil liberties' and 'freedom of speech' are certainly not synonymous with license and obscenity."

CONCLUSION

For the foregoing reasons the judgment of the court below should be affirmed.

Respectfully submitted,

EDMUND G. BROWN,
Attorney General of the State of California
CLARENCE LINN,
Assistant Attorney General
LOUISE FRANKEL,
Of Counsel
WILLIAM B. McKESSON,
District Attorney of Los Angeles County,
State of California
JERE J. SULLIVAN,
FRED N. WHICHELLO,
LEWIS WATNICK,
ROBERT LEDERMAN,
Deputy District Attorneys
Attorneys for Appellee.

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ONE, INCORPORATED, a corporation, Appellant,	)	No. 15,139
vs.	)	Feb. 27,
OTTO K. OLESEN, individually and as Postmaster of the City of Los Angeles, Appellee.	)	1957.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: BARNES and HAMLEY, Circuit Judges, and ROSS, District Judge.

ROSS, District Judge.

The plaintiff, ONE, INCORPORATED, a California corporation, is the publisher of the magazine entitled "ONE", which carries with it the designation, "THE HOMOSEXUAL MAGAZINE", and is published monthly in the City of Los Angeles, California. The defendant, OTTO K. OLESEN, is the POSTMASTER of the City of Los Angeles, California.

Plaintiff delivered to the United States Post Office at Los Angeles, California, for transmission to various

parts of the United States, several hundred copies of the October 1954 issue of "ONE", and was subsequently notified by the defendant that all copies so deposited for mailing were being withheld from dispatch for the reason that he considered the October 1954 issue of "ONE" obscene, lewd, lascivious and filthy, and as such constituted non-mailable matter under the provisions of Section 1461 of Title 18 U.S.C.A., and Section 36.2 of Vol. 29, Code of Federal Regulations (1949). Subsequently, all copies of the magazine were returned by the POSTMASTER to the plaintiff.

Plaintiff then commenced this action seeking a judgment declaring the October 1954 issue of "ONE" lawful and mailable, and an injunction against the POSTMASTER, his agents, servants and employees enjoining them from in any manner failing or refusing to dispatch in the regular course of mail the October 1954 issue of "ONE."

In the trial court, the parties stipulated that the only issue involved was whether the October 1954 issue of "ONE" is non-mailable matter under the provisions of 18 U.S.C.A. 1461, and that such issue should be determined on the motions for summary judgment and the affidavits filed by each of the parties.

The trial court concluded that the POSTMASTER properly refused to transmit the October 1954 issue of "ONE" in the United States mails because it constitutes non-mailable matter under the provisions of 18 U.S.C.A. 1461. From this adverse judgment, plain-

tiff appeals and asserts the following specifications of error:

1. The October 1954 issue of "ONE" is not lewd, lascivious, obscene or filthy, under the standards set forth in 18 U.S.C.A. 1461, and the Findings of Fact set forth in Paragraph VI of the trial court's Findings of Fact, Conclusions of Law and Judgment, are erroneous as a matter of law and fact.

2. That action of the defendant in refusing to transmit said magazine is arbitrary, capricious and an abuse of discretion, unsupported by evidence, deprives plaintiff of equal protection of the laws and constitutes a deprivation of plaintiff's property and liberty without due process of law, and that therefore, the trial court's Conclusions of Law, specifically Paragraph I thereof, are erroneous as a matter of law and fact.

All of the evidence is in writing so we will review the entire evidence, giving due consideration to the findings and conclusions of the trial court. *United States v. United States Gypsum Co.*, 333 U.S. 364, 394, 395, 68 S. Ct. 525, 92 L.Ed. 746; *Besig v. United States*, 9 Cir. 1953, 208 F2d 142, 144; *Orvis v. Higgins*, 9 Cir. 1950, 180 F2d 537, 539; *Equitable Life Assurance Soc. v. Irelan*, 9 Cir. 1941, 123 F2d 462, 464; Rule 52(a) F.R.C.P. 28 U.S.C.A.

The trial court in Paragraph 6 of its Findings of Fact, referred to by plaintiff in its specifications of error, made the following findings:

1. The story "Sappho Remembered" appearing on pages 12 through 15, is obscene because lustfully stimulating to the homosexual reader.

2. The poem "Lord Samuel and Lord Montagu", appearing on pages 18 and 19, is obscene because of the filthy language used in it.

3. The advertisement for the Swiss publication "The Circle" appearing at the top of page 29, is non-mailable matter because it gives information for the obtaining of obscene matter.

Briefly stated, the specifications of error made by plaintiff, raise but one question, namely: Whether or not the October 1954 issue of "ONE" is non-mailable matter under the provisions of Sec. 1461, Title 18, U.S.C.A.

The pertinent part of Sec. 1461, before the Amendment in 1955, is quoted as follows:

> "Every obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character; and . . .
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, . . ., whether sealed or unsealed; . . . is declared to be non-mailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier. . . ."

Being thus advised we now look into the merits of the appeal. At the outset it is well to dispel any thought that this court is its brothers keeper as to the type of reading to be indulged in. Since the advent of the printing press eminent scholars, including some men of the bench and bar, have uttered and written imperishable words in defenses of the freedom of thought and expression, and the place of a free press in a free world. We need not take issue with this gallant host.

As we view this case we are only concerned with the proper application of a postal regulation, a prosaic and every day matter of the administration of the post office department. Section 1461 amounts to no more than that. Approaching the problem in this workaday manner we find that "ONE" has already suffered two reverses in this connection, the first at the hands of the POSTMASTER, the other by reason of the judgment of the District Court sustaining the POSTMASTER'S ruling. At this point it can be observed that there is no dispute on factual matters.

The District Court found that the ruling of the POSTMASTER was reasonable and supported by the proof—the contents of the magazine. Unless we find that the initial order of the POSTMASTER barring the magazine from the mails was arbitrary, or capricious, or an abuse of discretion, or that there are no reasonable grounds in the record to support the District Court in upholding the POSTMASTER'S order, we are required to sustain.

Our problem here is one of the administration of the post office, and that in turn depends on whether or not the matter sought to be mailed, in this instance the October 1954 issue of the magazine "ONE", is obscene, lewd, lascivious, filthy or indecent. These words can only be defined by some discussion of the moral sense of the public, and it is only to such extent that we are concerned with public morals. In approaching the moral side of the issue here presented we are not unmindful of the fact that morals are not static like the ever lasting hills, but are like the vagrant breezes to which the mariner must ever trim his sails.

The problem here posed cannot, however, be disposed of in a cavalier manner, for we are dealing with intangibles. Our ultimate conclusion as to whether the magazine is mailable or not must be based upon the effect, or impact, that the wording of the various articles in the magazine have upon the reader. There is no precise pattern for reader reaction, so in determining whether the thought patterns created by the words employed in the magazine articles are obscene, lewd, lascivious, filthy or indecent, we must ascertain how other courts met the problem.

Much is now presented to the public, through eye and ear, which would have been offensive a generation ago, but does not today merit a second thought as to propriety. None the less, so long as statutes make use of such words as obscene, lewd, lascivious, filthy and indecent, we are compelled to define such expressions

in the light of today's moral dictionary, even though the definition is at best a shifting one.

The words of the statute, "obscene", "lewd", "lascivious", "filthy" and "indecent", are words of common usage and meaning. In considering the scope and meaning of the words the courts have, through the course of the years, given to such words legal definitions and distinctions, following very closely, if not precisely, the definitions and distinctions found in the recognized standard dictionaries.

Mr. Justice Harlan in delivering the opinion of the court in *Rosen v. United States*, 161 U.S. 29, 43, 16 S. Ct. 434, 40 L. Ed. 606, said, "Every one who uses the mails of the United States for carrying papers or publications must take notice of what, in this enlightened age, is meant by decency, purity, and chastity in social life, and what must be deemed obscene, lewd, and lascivious." In that case the court approved the following test of obscenity given in an instruction of the trial court: "The test of obscenity is whether the tendency of the matter is to deprave and corrupt the morals of those whose minds are open to such influence and into whose hands a publication of this sort may fall." "Would it suggest or convey lewd thoughts and lascivious thoughts to the young and inexperienced?"

In *Dunlop v. United States*, 165 U.S. 486, 500, 501, 17 S. Ct. 375, 41 L. Ed. 799, the Supreme Court approved the following instruction:

"Now, what are obscene, lascivious, lewd or indecent publications is largely a question of your own conscience and your own opinion; but it must come —before it can be said of such literature or publication—it must come up to this point: that it must be calculated with the ordinary reader to deprave him, deprave his morals, or lead to impure purposes. . . . It is your duty to ascertain in the first place if they are calculated to deprave the morals; if they are calculated to lower that standard which we regard as essential to civilization; if they are calculated to excite those feelings which, in their proper field, are all right, but which, transcending the limits of that proper field, play most of the mischief in the world."

In *Swearingen v. United States,* 161 U.S. 446, 16 S. Ct. 562, 40 L.Ed. 765, the Supreme Court in distinguishing matter which is coarse and vulgar, from obscene, lewd and lascivious matter, held that coarse and vulgar language is not within the meaning of the words obscene, lewd and lascivious. It was said that the words "'obscene", "lewd" and "lascivious", as used in the statute, signify that form of immorality which has relation to sexual impurity, and that it could not perceive of anything in the coarse and vulgar language used in the questioned letter, which was of a lewd, lascivious and obscene tendency, calculated to corrupt and debauch the mind and morals of those into whose hands it might fall.

The Supreme Court in *United States v. Limehouse,* 285 U.S. 424, 52 S. Ct. 412, 76 L. Ed. 843, distinguished filthy matter from obscene, lewd or lascivious matter

in holding that filthy material constituted a new class of non-mailable matter.

The Sixth Circuit in *Tyomies Publishing Co. v. United States,* 211 F. 385, p. 390, defined the word "filthy" as meaning "that which is nasty, dirty, vulgar, indecent, offensive to the moral senses, morally depraving and debasing."

This Court in *Magon v. United States,* 248 F. 201, noted it had been uniformly held in construing the word "obscene", as used in the particular statute, that if the matter were of such nature as would tend to corrupt the morals of those whose minds are open to such influences by arousing or implanting in such minds lewd or lascivious thoughts or desires, it is within the prohibition of the statute.

In *Duncan v. United States,* 48 F2d 128, on page 132, we stated that the test is whether or not the language alleged to be obscene would arouse lewd or lascivious thoughts in the minds of those hearing or reading the publication. The defintion and meaning of the words obscene, lewd and lascivious were again considered by this court in *Burstein v. United States* (1949), 178 F. 2d 665, and in *Besig v. United States* (1953), 208 F2d 142.

Judge Pope, in *Burstein v. United States,* 178 F2 665, 9th Cir., approved the following instruction defining obscene, lewd, or lascivious:

> "Matter is obscene, lewd, or lascivious, within the meaning of the quoted statute, if it is offensive to

> the common sense of decency and modesty of the community, and tends to suggest or arouse sexual desires or thoughts in the minds of those who by means thereof may be depraved or corrupted in that regard. The true inquiry in this case is whether or not the publication charged to have been obscene was in fact of that character, and if it was, and the defendant knew its contents at the time he deposited it in the mail, it is not material that he, himself, did not regard it as obscene. . . . The true test to determine whether a writing is nonmailable as obscene, lewd, or lascivious is whether its language has a tendency to deprave or corrupt the morals of those whose minds are open to such influences and into whose hands it may fall by allowing or implanting in such minds obscene, lewd, or lascivious thoughts or desires."

For another definition of the words obscene, lewd, lascivious, filthy and indecent, and an attempted differential, see *Sunshine Book Company v. Summerfield*, 128 FS 564. There the court said:

> "These definitions are the beacons by which the legal channel is lighted for the court . . ."

When the approved definitions and tests are applied to certain articles in the "ONE" magazine, it is apparent that the magazine is obscene and filthy and is therefore non-mailable matter.

Plaintiff, as publisher, states on the second page of the magazine that it is published for the purpose of dealing primarily with homosexuality from the scien-

tific, historical and critical point of view—to sponsor educational programs, lectures and concerts for the aid and benefit of social variants and to promote among the general public an interest, knowledge and understanding of the problems of variation. The story "Sappho Remembered", appearing on pages 12 to 15 of the magazine, the poem "Lord Samuel and Lord Montagu", on pages 18 and 19, and the information given on page 29 as to where to obtain "The Circle", a magazine "with beautiful photos", do not comport with the lofty ideals expressed on page 2 by the publishers.

The article "Sappho Remembered" is the story of a lesbian's influence on a young girl only twenty years of age but "actually nearer sixteen in many essential ways of maturity", in her struggle to choose between a life with the lesbian, or a normal married life with her childhood sweetheart. The lesbian's affair with her room-mate while in college, resulting in the lesbian's expulsion from college, is recounted to bring in the jealousy angle. The climax is reached when the young girl gives up her chance for a normal married life to live with the lesbian. This article is nothing more than cheap pornography calculated to promote lesbianism. It falls far short of dealing with homosexuality from the scientific, historical and critical point of view.

The poem "Lord Samuel and Lord Montagu" is about the alleged homosexual activities of Lord Montagu and other British Peers and contains a warning

to all males to avoid the public toilets while Lord Samuel is "sniffing round the drains" of Piccadilly (London). The poem pertains to sexual matters of such a vulgar and indecent nature that it tends to arouse a feeling of disgust and revulsion. It is dirty, vulgar and offensive to the moral senses. *Swearingen v. United States,* 161 U.S. 446, 16 S. Ct. 562, 40 L. Ed. 765; *United States v. Limehouse,* 285 U. S. 424, 426, 52 S. Ct. 412, 76 L. Ed. 843; *Tyomies Pub. Co. v. United States,* 6 Cir. (1914) 211 F. 385, 390; *United States v. Roth,* 237 F2d 796, 799, 800.

An article may be vulgar, offensive and indecent even though not regarded as such by a particular group of individuals constituting a small segment of the population because their own social or moral standards are far below thoses of the general community. Social standards are fixed by and for the great majority and not by or for a hardened or weakened minority. As this Court said in *Besig v. United States,* 208 F2d 142, p. 145:

> "It is of course true that the ears of some may be so accustomed to words which are ordinarily regarded as obscene that they take no offense at them, but the law is not tempered to the hardened minority of society. The statute forbidding the importation of obscene books is not designed to fit the normal concept of morality of society's dregs, nor of the different concepts of morality throughout the world, nor for all time past and future, but is designed to fit the normal American concept in the age in which we live. It is no legitimate

argument that because there are social groups composed of moral delinquents in this or in other countries, that their language shall be received as legal tender along with the speech of the great masses who trade ideas and information in the honest money of decency."

It is difficult to determine if the article contained on page 29 under the caption "FOREIGN BOOKS AND MAGAZINES. THAT WILL INTEREST YOU", is an advertisement for the magazine "The Circle" or is merely information given by the publisher of "ONE" to its readers as to where to obtain other books and magazines that may be of interest. Regardless, the situation is the same, if information is given as to where, or how, or from whom, or by what means, obscene or filthy material may be obtained. Although on its face the information in this article appears harmless, it cannot be said that the purpose is harmless. It is for the information of those who read the magazine and particularly the homosexuals. It conveys information to the homosexual or any other reader as to where to get more of the material contained in "ONE."

An examination of "The Circle" clearly reveals that it contains obscene and filthy matter which is offensive to the moral senses, morally depraving and debasing, and that it is designed for persons having lecherous and salacious proclivities.

The picture and the sketches are obscene and filthy by prevailing standards. The stories "All This and

Heaven Too", and "Not Til the End", pages 32-36, are similar to the story "Sappho Remembered", except that they relate to the activities of the homosexuals rather than lesbians. Such stories are obscene, lewd and lascivious. They are offensive to the moral senses, morally depraving and debasing. Such literature cannot be classed as historical, scientific and educational for any class of persons. Cheap pornography is a more appropriate classification.

Plaintiff contends that the magazine "ONE" when read as a whole is not obscene or filthy within the meaning of these words. In *Besig v. United States*, supra, we held that the book as a book must be obscene to justify its libel and destruction; but we also held that neither the number of the "objectionable" passages nor the proportion they bear to the whole book are controlling. The magazine under consideration, by reason of the articles referred to, has a primary purpose of exciting lust, lewd and lascivious thoughts and sensual desires in the minds of the persons reading it. Moreover, such articles are morally depraved and debasing. The articles mentioned are sufficient to label the magazine as a whole, obscene and filthy.

In *Parmelee v. United States*, 113 F2d 729, speaking of the "book as a whole" doctrine, the court having before it a related problem, said:

> "Although the word (obscene) has been variously defined, the test in many of the earlier cases was that laid down by Lord Chief Justice in Regina v. Hicklin (3 Q.B. 360, 369, 1868), as follows: '. . .

whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.' And the rule was applied to those portions of the book charged to be obscene rather than to the book as a whole. But more recently this standard has been repudiated, and for it has been substituted the test that a book must be considered as a whole, in its effect, not upon any particular class, but upon all those whom it is likely to reach."

The point that the action of the defendant in refusing to transmit the magazine in the United States mails, is arbitrary, capricious, an abuse of discretion and unsupported by the evidence, is without merit. The only argument to sustain this point is that the magazine is not obscene or filthy under the standards set forth in 18 U.S.C.A. 1461. We have decided otherwise.

Plaintiff alsos contends that it has been deprived of the equal protection of the laws. In the trial court, plaintiff stipulated that the only issue involved was whether the October 1954 issue of "ONE" is nonmailable matter under the provisions of 18 U.S.C.A. 1461, and that such issue should be determined on the motions for summary judgment and the affidavits filed by each of the parties. There is nothing in the record to show that plaintiff has been denied the equal protection of the laws. Section 1461 Title 18 U.S.C.A. is applicable to all matter declared by the statute to

be non-mailable, without regard to the character of the persons or class of persons seeking to use the mails for the dissemination of non-mailable matter.

Plaintiff's contention that there has been a denial of due process of law is without merit. Plaintiff commenced this action in the trial court and stipulated that the only issue in the case should be determined by the court on the motions for summary judgment and the affidavits filed by each of the parties. There has been a full and fair trial upon proper notice and the issues presented. It does not appear from the record that plaintiff has been deprived of property or liberty without due process of law.

Based upon our comments and observations heretofore given we hold that the record discloses no prejudicial error and the judgment appealed from is affirmed.

(Endorsed:) Opinion. Filed Feb. 27, 1957.

Paul P. O'Brien, Clerk.